

Supreme Court, U. S.
FILED

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MICHAEL WOOD, JR., CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-1118

DON BENSCHOTER,
Appellant,

-vs-

THE FIRST NATIONAL BANK OF LAWRENCE and
KUHN TRUCK AND TRACTOR COMPANY, INC.
Appellees.

On Appeal From the Supreme Court of Kansas

BRIEF OPPOSING DEFENDANTS'
MOTION TO DISMISS OR AFFIRM

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ATTORNEYS FOR APPELLANT

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BRIEF OPPOSING DEFENDANTS' MOTION TO DISMISS OR AFFIRM

Appellant, pursuant to the authority contained in Rule 16(4) of the Rules of the Supreme Court of the United States, makes the following suggestions in opposition to the motions to dismiss this appeal or in the alternative to affirm the judgment of the Supreme Court of Kansas filed herein by the individual appellees:

1. THE INSTANT APPEAL IS WITHIN THE COURT'S JURISDICTION.

Appellee, The First National Bank of Lawrence, lists as its first ground for dismissal of the instant appeal that the appeal was not taken in strict conformity with Rule 33 in that proof of service of appellant's notice of appeal was made by a certificate of service rather than by an affidavit of service. Appellee notes an awareness of this Court's holding in *Parker v. Levy*, 417 U.S. 733 (1974), which held that such a technical noncompliance did not effect the jurisdiction of this Court. However, appellee urges that the additional fact that Appendix "D" of appellant's jurisdictional statement, which sets forth appellant's notice of appeal and indicates that both Fred W. Phelps and Robert E. Tilton signed the certificate of

service while in fact only Fred W. Phelps actually signed it, somehow calls for a different conclusion and deprives this Court of jurisdiction over this appeal.

As this Court pointed out in *Heflin v. United States*, 358 U.S. 415, 418, n. 7 (1959) and again in *Taglianetti v. United States*, 394 U.S. 316, n. 1 (1968), both of which are cited in rejecting the claim in *Parker*, the time limitation is not jurisdictional. So long as the appellee receives actual notice of the appeal, technical noncompliance with Rule 33 does not deprive this Court of jurisdiction to hear the appeal. There being no real distinction between *Parker* and the instant appeal, since appellees herein do not deny having received actual notice of this appeal, a stenographic error in transcribing the signatures in Appendix "D" should not be held to raise this error above a mere technicality. Appellant submits that *Parker* should be found to control and that this first ground for dismissal urged by appellee should be rejected.

2. THE INSTANT APPEAL PRESENTS A SUBSTANTIAL FEDERAL QUESTION.

The major ground urged by both appellees herein for dismissal of this appeal or for affirmation of the state court's decision is that no substantial federal question is involved. It is the contention of the appellant that there is such a substantial federal question. The recent decisions of this Court dealing with

debtor's rights, starting with *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969), have sparked a great deal of interest, debate and controversy among the members of the legal profession as well as among the public at large. This interest, in turn, has led to considerable litigation in an attempt to define the limits of the rights recognized by this Court. One major question which has been raised has been whether the protection of the due process clause of the Fourteenth Amendment extends to the protection of debtors from the deprivation of property in which they have an unquestioned interest through the simple expedient of the remedy commonly known as "self-help repossession". The extent of this interest is shown by the numerous cases cited by the appellees in their motion. While appellant readily admits that the weight of authority in these recent decisions is against the position urged by appellant, it is certainly not unanimous, and, just as certainly, it has not definitively settled the question presented herein. Appellant submits that what is needed, both by the legal profession and by the public at large, is for this Court to make a definitive statement, whatever that decision might be, in order to further delineate the rights of this ever increasing body of debtors in our society.

Those decisions which have upheld the constitutionality of this section of the Uniform Commercial Code have normally done so based on a finding that the required state action was not present. This finding, in turn, has arisen from the fact that

self-help repossession derives from the common law, and that section 9-503 of the Uniform Commercial Code does nothing more than codify this common law remedy.

While appellant recognizes that self-help repossession was recognized and sanctioned by the case law of Kansas prior to its codification in the section in question, appellant contends that this codification as a part of the comprehensive scheme of creditors' remedies contained in Article 9 of the Uniform Commercial Code had the effect of emphasizing and encouraging its use so as to entwine the state in the repossession of goods in this manner. Appellant would urge this Court to adopt the reasoning of Chief Judge Fox in his decision in *Watson v. Branch County Bank*, 380 F.Supp. 945 (1974), and find that the legislature of the State of Kansas, in choosing to involve itself in a restructuring and codification of creditor remedies in general through the adoption of Article 9 of the Uniform Commercial Code, took upon itself the duty to provide for due process of law and that the inclusion of 9-503 in that comprehensive plan violated that duty and resulted in sufficient state action to allow this Court to review the constitutionality of K.S.A. 84-9-503 under the due process clause of the Fourteenth Amendment.

3. CONCLUSION.

In conclusion, appellant submits that the interests of the public as a whole, and those of the legal profession and the

courts, would best be served by a definitive determination of the issues presented by the instant appeal. Appellant submits that a substantial federal question is herein presented and that the requisite state action for application of the Fourteenth Amendment to this situation is to be found in the legislative adoption of a comprehensive plan of creditor remedies, such as Article 9 of the Uniform Commercial Code, authorizing and encouraging the use of self-help repossession. Appellant submits that the requisite state action is to be found despite the common law origins of the self-help remedy. For these reasons, appellant respectfully urges that the motions filed herein by the individual appellees to dismiss this appeal or alternatively to affirm the judgment of the Supreme Court of Kansas should be denied and that this appeal should proceed.

Respectfully submitted,

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